UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OMAR HEMED
1905 15th Street, NW
Washington, DC 20009

Plaintiff

v. Civil Action No.

UNITED STATES DEPARTMENT OF
HOMELAND SECURITY
Office of the General Counsel
20 Massachusetts Avenue, NW
Washington DC 20528

Defendant

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Introduction

1. Plaintiff, a citizen of Tanzania, is seeking asylum here in the United States. He fears torture and death if he deported. He is scheduled for a hearing on his asylum application in November 2014, in Immigration Court, where defendant will attempt to deport him.

1a. Defendant has two documents in its possession: "Notes" of and asylum officer and an "Assessment" of an Asylum Officer. Defendant may use those documents in Immigration Court, against Plaintiff.

1b. Defendant refuses to give the documents to Plaintiff. This refusal violates Plaintiff's rights to Due Process and to fundamental fairness.

2. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. This is also an action under 8 U.S.C. § 1229a (b) (4) (B), which gives aliens certain rights in Immigration Court.

Jurisdiction and Venue

3. This court has subject matter jurisdiction over this action pursuant to 5 U.S.C. § 552(a) (4) (B), and 28 U.S.C. § 1331. This court has jurisdiction to grant declaratory and further necessary or proper relief pursuant to 28 U.S.C. §§2201-2202 and Federal Rules of Civil Procedure 57 and 65.

4. Venue in this district is proper under 5 U.S.C. § 552(a) (4) (B) and 28 U.S.C. § 1391(c) as all parties are located in the District of Columbia.

The parties

5. Plaintiff Omar Hemed is a native and citizen of Tanzania. He is scheduled for an Individual Hearing on November 20, 2014, before Judge Iskra, at the Arlington, VA Immigration Court, where he will seek asylum, pursuant to 8 U.S.C. § 1158. Plaintiff's A number is 201-251-913.

6. Defendant DHS is a department of the executive branch of the United States government and is an agency within the meaning of 5 U.S.C. § 552(f). DHS is responsible for enforcing federal immigration laws. DHS has possession and control over the documents sought by plaintiff. DHS is seeking to deport plaintiff from the United States and return him to the dictatorial regime holding power in Tanzania.

The asylum process

7. An alien fleeing persecution in his native country may apply for asylum here in the United States, pursuant to § 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158.

8. The alien is entitled to an interview before an asylum officer, who is employed by the DHS. At the interview, there is no court reporter and no recording device. The officer takes notes, often by hand.

8a. Asylum Officers are admonished to NOT state their personal opinions. "Interview notes...must not contain the asylum officer's subjective opinions....' [Asylum Office Basic Training Course, October 2001, "Note-Taking" page 9]. Officers are admonished to take "clearly written and comprehensive notes during the interview," because later many different persons may have access to the notes: "...if interview notes are introduced as evidence in proceedings in Immigration Court, the applicant and representative are given a copy of the notes." [*Id.* at page 4].

9. After the interview, the officer may decide to grant asylum; in that case, the alien is pleased, and can start the process toward becoming a citizen of the United States.

10. However, the officer may decide that asylum should not be granted. In that case, he must prepare one of two documents: 1] "Notice of Intent to Deny," which sets forth the analysis of the officer, and allows the applicant to rebut the decision, or 2] "Assessment to Refer," which also sets forth the analysis of the officer.

<u>If the asylum applicant is in valid immigration status</u>

11. A Notice of Intent to Deny ["NOID"] is written if the alien-asylum applicant is in a valid immigration status, such as being a tourist ["B-2 status"] or being a student ["F-1 status"]. *See* Attachment 1 for an example of a NOID.

12. An Assessment to Refer is written if the alien is no longer in valid status, such as being a tourist who overstayed his tourist visa. [This describes the Plaintiff, Mr. Hemed.] *See* Attachment 2 for an Assessment which was filed in Immigration Court in 2001. *See* Attachment 3 for an Assessment which was attached to an opinion of the Ninth Circuit Court of Appeals, *Singh v. Gonzales*, 403 F.3d 1081, 1087 (9th Cir. 2005). *See* Attachment 4 for an Assessment filed in Immigration Court in 2007.

13. The content of a NOID is very similar to the content of an Assessment.

14. NOIDS are disclosed to asylum applicants by the thousands. This disclosure does not harm the Defendant.

15. Defendant admitted the truth of ¶ 14 in Document 10-1, filed in the case *Anguimate v. DHS,* Civil Action No. 12-0791 (RBW).

16. The applicant has 16 days in which to respond to the NOID. This response may change the mind of the asylum officer, and asylum is then granted. If the officer does not change his mind, then the alien merely continues to live here in the United States as before [i.e. as a tourist or student].

If the asylum applicant is NOT in valid immigration status

17. An Assessment to Refer is written, if the applicant is out of status. For example, the applicant may have earlier been a tourist or a student, but at the time of the asylum officer decision, that status expired.

18. The asylum officer writes an Assessment to Refer, but does NOT give it to the applicant. Instead, the officer gives the applicant a notice to appear in Immigration Court for a master hearing. At that hearing, the Immigration Judge will ascertain the identity and address of the alien, and ask what relief the alien seeks. If the alien still seeks asylum, an Individual Hearing is set; at that time, the alien and others may testify.

18a. Asylum officers are instructed and trained that Assessments shall later be read and used by "a number of persons," including the "applicant and his or her attorney..." The applicant and his attorney "may Submit a Freedom of Information Act [FOIA] request to obtain a copy of any assessment (and other information in the file)." *See* page 11 of Decision *Writing Part I,* dated June 21, 2004.

19. The Assessment to Refer and the Notes of the asylum officer are given to the DHS lawyer. At times, the DHS lawyer will use these documents in Immigration Court, to discredit the applicant. If the asylum officer relied on certain facts and information to deny asylum, it is "reasonable to expect" the government lawyer would use the same material against the applicant in immigration court. *Kaur v. INS*, 237 F.3d 1098 (9th Cir. 2001).

19a. The DHS lawyer may believe the documents are prior inconsistent statements; the lawyer would argue to the Immigration Judge

that the applicant is inconsistent, therefore not credible; therefore, not deserving of asylum; therefore, applicant should be deported.

19b. The Board of Immigration Appeals has recognized that notes of the asylum officer, and any other evidence of what was said under oath during an asylum interview, may be considered by an immigration court. *In re R-S-J-*, 22 I&N Dec. 863, 872 (BIA 1990) ("It may be necessary to present the testimony of the asylum officer before the Immigration Court, together with notes and other evidence of what was said under oath.")

19c. The Board of Immigration Appeals has recognized that an asylum officer may testify in immigration court. *In re R-S-J-*, 22 I&N Dec. 863, 872 (BIA 1990).

20. The Notes of an asylum officer were used in Immigration Court in *Khattak v. Holder,* __ Fed. Appx. ___ , 2013 U.S. App. LEXIS 1150 (1st Cir. 2013). The notes were cited in footnotes 1, 3, 5. According to the asylum officer, Khattak said he was threatened with being beheaded. In Immigration Court, Khattak denied making such a statement. [note 3, at *4].

The Notes of an asylum officer were used in Immigration Court in *Sharma v. Holder,* 457 Fed. Appx. 614, 616, 2011 U.S. App. LEXIS 22112 (9th Cir. 2011). The applicant told the asylum officer she was physically attacked; but told the Immigration Judge was only threatened. The Immigration Judge ruled that the applicant was inconsistent, therefore not credible, therefore not deserving of asylum.

21. The handwritten Notes and also the Assessment to Refer were relied upon in *Sinani v. Holder,* 418 Fed. Appx. 475, 2011 U.S. App. LEXIS 8187 (6th Cir. 2011). According to the Notes of the officer, the applicant told the asylum officer that police officers were silent after they raped her [and hence did not reveal their motive]; but told the Immigration Judge that the police officers called the Mayor on the phone, and talked to him, in her presence, and clearly stated their motive.

22. When asked about this inconsistency, the applicant stated she did not remember what she told the officer, or that she did NOT make such statements to the officer. Even though the asylum officer did not testify in

court, the Immigration Judge believed the Notes of the officer over the live testimony of the applicant.

The Notes and also the Assessment to Refer were relied upon in *Kudryashov v. Holder,* __ Fed. Appx. ___, 2012 U.S. App. LEXIS 16862 (9th Cir. 2012). The Immigration Judge asked the applicant if he had made certain statements to the asylum officer [at *6]. The applicant told the Judge he did not recall making some of the statements. [The case was remanded, in part because the applicant had not been given the opportunity to review the Assessment before his merits hearing and the asylum officer did not testify at his removal hearing. *Id.*at *5.

A "detailed assessment" of an asylum officer was relied upon in *Sacko v. Holder,* __ Fed. Appx. ___, 2013 U.S. App. LEXIS 576 (6th Cir. 2013). Sacko told the asylum officer he had been detained for two weeks, but then told the Immigration Judge he had been detained for seven months. He told the asylum officer he was not beaten; he told the Immigration Judge he was beaten with batons. The Immigration Judge ruled that Sacko was not credible.

An Assessment to Refer was used in *Yu v. Holder*, 693 F.3d 294, 296 (2d Cir. 2012).

23. The Court can take judicial notice that busy officers will, from time to time, make mistakes. The Eleventh Circuit noted an error in an Assessment in *Ido v. U.S. Att'y Gen.,* 2012 U.S. App. LEXIS 14029, at *8. (11th Cir. 2012) (the year of the first arrest was written down in error).

24. The Ninth Circuit criticized reliance upon an Assessment in *Singh v. Gonzales*, 403 F.3d 1081, 1087 (9th Cir. 2005), deeming it "potentially unreliable." The Court attached a copy of the Assessment as an Appendix to its decision. [It is attached to this complaint as Attachment 3.]

Asylum officers rely upon materials not available to the applicant

25. 8 C.F.R. section 208.12(a), [2013] entitled *Reliance on information compiled by other sources,* is just one sentence long, and states that the asylum officer may rely on material from the Department of State "or other credible sources, such as international organizations, private voluntary agencies, news organizations, or academic institutions."

25a. After the interview, the asylum officer is permitted, and encouraged, to do his own research and fact-finding. The officer is not bound by Fed. R. Evid. 201(b) which refers to facts capable of accurate determination by resort to "sources whose accuracy cannot reasonable be questioned." Whatever facts, theories, or inferences garnered by the officer are put into the Assessment without notice to the applicant. The applicant is not given any opportunity to rebut such facts or inferences.

25b. The asylum officer is not required to give a citation to the record in support of an asserted fact. Local Civil Rule 7(h) is not binding on the officer. *See Perry v. Shinseki*, 783 F. Supp. 2d 125, 131 (D.D.C. 2011). He is not required to create and establish a record.

26. In the Assessment for Ms. Tjew, A# 079-476-365, the officer writes "The RIC received information from ICANET [Indonesian Chinese and American Network] in an email dated March 28, 2001." *See* Attachment 2. The officer does not describe what the "RIC" is. The officer does not attach a copy of the email. The officer does not state what individual wrote the email, and does not state whether the individual was trustworthy or reliable.

27. In the Assessment to Refer for Mr. Rebeiro, A # 073-163-139, the asylum officer quoted from a publication of the Department of State entitled, "Bangladesh: Profile of Asylum Claims." This publication is NOT available to the public.

28. In an Assessment to refer dated September 30, 1999, the asylum officer quoted from this source: "DIRB, ZAR27047.FEZ, *Zaire, Information on events*...3 June 1997, published on UNHCR Refworld CD-ROM." [Italics in the original]. This source is too obscure to be found.

29. In an Assessment for Mr. Tuang, # 077-870-603, the Asylum Officer made a finding "based upon guidance from Asylum Branch Headquarters, dated May 27, 1998, HQ Memo (HQASM 120/9.7.1). This source is not available to the public.

Asylum applicants had some rights taken away in 1997.

30. 8 C.F.R. § 208.12(a) was amended in 1997. Before this date, subsection (a) contained an additional sentence:

> Prior to the issuance of an adverse decision made in reliance upon such material, that material must be identified and the applicant must be provided with an opportunity to inspect, explain, and rebut the material, unless the material is classified under E.O. 12356.
>
> [*see* 62 FR 10312 (3/6/97).]

Section 208.12(a) no longer contains this sentence. After 1997, and currently, an officer may rely upon material *not disclosed* to the applicant.

If the asylum officer made a mistake, the applicant needs to know well in advance of his deportation hearing.

31. The Assessment may contain errors made by the Officer. In that event, the applicant will be very surprised in court. It is unfair to the applicant to be taken by surprise in court, by use of a statement written by someone else. When a serious mistake is made by the Officer, the applicant might be able to resolve it informally or at a pre-trial conference. The Immigration Judge, no doubt, would prefer that the parties solve such a problem themselves. If not, applicant could issue a subpoena for the Officer, so the alien can cross-examine him in Immigration Court. The Officer might admit he made a mistake; or, the Immigration Judge might conclude that the Officer made a mistake.

32. The alien needs to know several weeks before the court hearing about the need for a subpoena, in order to get it served. The Immigration Judge will want to know how long a hearing might take, and which witnesses will testify. Disclosure of the Assessment will benefit the Immigration Judge hearing the case, and will benefit the Immigration Court as well.

The DHS has disclosed notes and Assessments in the past

33. The DHS has been inconsistent concerning disclosures of notes and Assessments. As evidenced by the Assessments which are attached to the complaint, the DHS at times has given Assessments to applicants before trial begins in Immigration Court.

34. There was a time period, perhaps during the years 1998-2007, where Assessments to Refer were easily made available to asylum applicants. During this time period, and after: a] there was no "injury to the quality of agency decisions;" b] "open and frank discussions" inside the Asylum Office were not discouraged; c] there was no "premature disclosure of proposed policies;" d] the public was not "confused" or "misled" by the disclosure of "reasons that were not in fact ultimately the grounds for the agency's decision; and e] there was no effect on "the efficient operation of the government."

35. On January 30, 2012, in the Arlington VA Immigration Court, the DHS handed a copy of the Assessment of Ms. Nyima Sarr, # 087-665-034, to the Immigration Judge, who read it. Counsel for Ms. Sarr, counsel for DHS and the Judge discussed the Assessment, on the record. Counsel for Ms. Sarr had not read the Assessment until that minute in open court.

Procedural history

36. Plaintiff Mr. Hemed was born in Tanzania on July 27, 1955. He is a member of the "Pemba" ethnic group.

37. In 1996, the Tanzania police came to his house, searched it, and threatened to imprison and kill him. They refused to allow him to vote in 2000, 2005, and in 2010, because of his ethnic group.

38. In 2001, the police came to his house again, searched it, beat him with clubs and wires, and raped his wife. The police beat him with bicycle chains in 2005, at his house. They took him to the police station, where they beat him and held him for five days. He was released on the condition that he report to the police every Wednesday.

39. In 2009, the government was assisting foreigners to get fake identification papers, so they could vote. Mr. Hemed, who was not allowed to vote himself, took photos of these foreigners, and reported it to the police. Mr. Hemed demanded that the police investigate and stop the illegal voting.

40. The police did not investigate; instead, they arrested and beat Mr. Hemed. They hit him with fists, sticks, and belts. He was charged with reporting false information to the police in March 2010. He was not given notice of any court hearing to be held in the future.

41. Mr. Hemed departed from his country on May 5th, and entered the United States as a tourist on May 7, 2010. He was authorized to remain here until November 6, 2010.

42. On May 28, 2010, Mr. Hemed was in the United States. On that same day, a court in Tanzania held a hearing. Mr. Hemed had been given no notice of that hearing. The court found him guilty of "disseminating false information likely to cause a breach of the peace," and sentenced him to prison for term of five years.

43. Mr. Hemed applied for political asylum, and attached photographs of some of his injuries to his application. *See* Attachment 5. Also attached to his asylum application was a copy of the Order of the Court in Tanzania, dated 28 May 2010. *See* Attachment 6.

44. Mr. Hemed had an interview with an asylum officer at the Arlington VA asylum office in June 2011. During that interview, the officer took notes of what he believed Hemed said.

45. After the interview, the officer prepared an "Assessment to Refer," which was typed and is about three pages long. In that Assessment, the officer summarized the evidence and gave reasons why the application of Mr. Hemed was rejected.

46. On July 11, 2011, Mr. Hemed was referred to Immigration Court. Defendant's Referral Notice states that Hemed was not granted asylum, in part due to inconsistencies between his testimony at the interview and [perhaps] "other evidence." Plaintiff was not informed about any particular inconsistency. Plaintiff was not informed about what "other evidence" was considered by the asylum officer.

47. Plaintiff made a FOIA request of the notes and Assessment of the asylum officer, which was received by defendant on March 1, 2012. Defendant responded to plaintiff's request on August 8, 2012, but did not provide the notes and the Assessment. *See* Attachment 7.

48. Plaintiff appealed the August 2012 response to the USCIS FOIA appeals office. Defendant denied the appeal, via a letter dated September 25, 2012. *See* Attachment 7.

49. Plaintiff attended a master hearing in the Arlington Immigration Court on November 14, 2012; at which time defendant repeated its intent to deport plaintiff.

50. On January 17, 2013, plaintiff filed a Motion to Compel Production of Documents, demanding the notes and the Assessment of the asylum officer, with the Arlington VA Immigration Court, and served a copy upon the DHS lawyer at 500 12th Street, SW, Washington DC.

51. The DHS has not yet responded to that motion.

52. The Immigration Court has not yet responded to that motion.

Exhaustion of administrative remedies

53. Plaintiff has exhausted any and all administrative remedies with defendant.

FIRST CAUSE OF ACTION

54. Plaintiff repeats, alleges and incorporates the allegations of paragraphs 1-53 as if fully set forth herein.

55. Plaintiff has a legal right under FOIA to obtain the notes of the asylum officer, and no legal basis exists for defendant's failure to make the notes available.

56. Defendant has violated the FOIA, 5 U.S.C. §§ 552(a). Defendant's wrongful withholding of the agency record violates the FOIA, § 552(a) (3) (A).

SECOND CAUSE OF ACTION

57. Plaintiff repeats, alleges and incorporates the allegations of paragraphs 1-56 as if fully set forth herein.

58. Plaintiff has a legal right under FOIA to obtain the Assessment of the asylum officer, and no legal basis exists for defendant's failure to make it available.

59. Defendant has violated the FOIA, 5 U.S.C. §§ 552(a). Defendant's wrongful withholding of the agency record violates the FOIA, § 552(a) (3) (A).

THIRD CAUSE OF ACTION

60. Plaintiff repeats, alleges and incorporates the allegations of paragraphs 1-59 as if fully set forth herein.

61. The burden of proof "is on the applicant to establish that the applicant is a refugee." 8 U.S.C. § 1158(b) (1) (B) (i). "There is no presumption of credibility." 8 U.S.C. § 1158(b) (1) (B) (iii). To assist applicant in meeting these burdens, Congress has also provided that the alien "shall have a reasonable opportunity to examine the evidence against him, to present evidence on the alien's own behalf, and to cross-examine witnesses..." 8 U.S.C. § 1229a (b) (4) (B).

62. Plaintiff has a "due process" right to a fair trial. Plaintiff has the right to fundamental fairness.

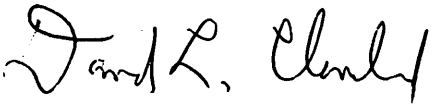
63. Defendant's actions are improperly infringing upon plaintiff's rights as outlined above.

WHEREFORE, plaintiff requests that judgment be entered in his favor against defendant and that the court:

a) Order defendant to disclose the notes of the asylum officer to plaintiff forthwith;
b) Declare that defendant's failure to disclose the notes violates FOIA;
c) Declare that defendant's failure to disclose the notes violates plaintiff's rights under 8 U.S.C. § 1229a (b) (4) (B).
d) Order defendant to disclose the Assessment to plaintiff forthwith;
e) Declare that defendant's failure to disclose the Assessment violates FOIA;
f) Declare that defendant's failure to disclose the Assessment violates plaintiff's rights under 8 U.S.C. § 1229a (b) (4) (B).
g) Enjoin defendant from failing to disclose notes and Assessments in the future;
h) Award plaintiff reasonable attorney fees and costs pursuant to 5 U.S. C. §552(a) (4) (E) and 28 U.S.C. § 2412; and
i) Grant all other such relief to plaintiff as the Court deems proper and equitable.

Respectfully submitted,

Attorney for Plaintiff



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